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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1966.

No. 301

THE BOARD OF EDUCATION OF THE CITY OF BESSEMER, et al., JEFFERSON COUNTY BOARD OF EDUCATION, et al., and THE BOARD OF EDUCATION OF THE CITY OF FAIRFIELD, et al.,
Petitioners,

v.

UNITED STATES OF AMERICA, DORIS ELAINE BROWN, et al., GEORGE ROBERT BOYKINS, et al., and LINDA STOUT, by Her Father and Next Friend, BLEVIN STOUT,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Fifth Circuit.

The Board of Education of the City of Bessemer et al., Jefferson County Board of Education et al., and the Board of Education of the City of Fairfield et al., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-entitled causes on March 29, 1967.

CITATIONS TO OPINIONS BELOW.

No opinions were written by the District Court.[1] Two decisions were rendered by the Court of Appeals. The original decision of a panel of the Court (Record, Vol. IV, p. 6) is reported at 372 F. 2d 836, and is printed in Appendix L to the petition in **Caddo Parish School Board v. United States**, filed in this Court in June, 1967. The opinions on rehearing by the court en banc (Record, Vol. IV, p. 12) is not yet reported, and also is printed in Appendix L to the petition in **Caddo Parish School Board v. United States**. Since the petitioners herein were consolidated in the Court of Appeals for purposes of argument and decision with petitioner in **Caddo Parish v. United States**, these petitioners ask leave to incorporate herein by reference Appendix L to the petition in **Caddo Parish.**[2]

JURISDICTION.

The original judgments of the Court of Appeals were entered on December 29, 1966 (Record, Vol. IV, pp. 7A-7C). A timely petition for rehearing en banc (R. Vol. IV, p. 8) was granted (R. Vol. IV, p. 9). The judgments of the Court on rehearing en banc were entered on March 29, 1967 (R. Vol. IV, p. 13). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

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[1] The District Court orders from which the appeals to the Court of Appeals were taken are at the following pages of the Transcript of Record: **Jefferson County**, Transcript Vol. I, pp. 70-71; **Bessemer**, Transcript Vol. II, pp. 85-86; **Fairfield**, Transcript Vol. III, pp. 65-66.

[2] Citations herein to the opinions below will include references to page numbers of the slip opinions printed in Appendix L.

QUESTIONS PRESENTED.

1. Whether the sole measure of the constitutional adequacy of a method of student assignment in public schools is that it results in a prescribed number of percentage of Negro children at schools with white children or a progressive change in the racial ratios of students ultimately removing racial imbalance or concentration.

2. Whether the Fourteenth Amendment imposes upon Negro children who freely choose to attend certain schools a duty to attend other schools in order to eliminate racial concentrations or imbalances in the schools chosen by them.

3. Whether a "freedom of choice" method of student assignment whereby all children have the unrestricted right to choose annually to attend any school in the system is rendered unconstitutional solely because it does not achieve prescribed percentage or numerical results reducing or removing racial imbalances or concentrations.

4. Whether an unrestricted "freedom of choice" method of student assignment must be combined with a neighborhood school or geographic zone method of assignment in order to be constitutionally adequate.

5. Whether there is a constitutional distinction between the existence in Northern school systems of racially imbalanced schools under "neighborhood" assignment plans and the existence in Southern school systems of similarly imbalanced schools under "free choice" assignment plans such as to require elimination of the imbalance in the Southern schools but not in the Northern schools.

6. Whether the requirement by a court of appeals of a detailed decree to be applied uniformly to every school system in the circuit without affording an evidentiary hearing as to the necessity or the effect of its provisions

on local educational and administrative functions unrelated to race is consistent with **Brown v. Board of Education** and other decisions of this Court.

7. Whether questions concerning the validity and propriety of the Court of Appeals' adoption of the so-called "1966 Guidelines" of the Department of Health, Education and Welfare were properly before and appropriate for decision by the Court of Appeals although the "Guidelines" were not issued until after the appeals were docketed, and, if so, whether such "Guidelines" are valid and within the Congressional intent of the Civil Rights Act of 1964.

8. Whether it is proper for a federal appellate court to adopt present and future regulations issued by the Department of Health, Education and Welfare for administration of federal funds under Title VI of the Civil Rights Act of 1964 as the court's constitutional standards in determining rights under the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The constitutional provision involved is Section I of the Fourteenth Amendment to the Constitution of the United States. The statutory provisions involved are Sections 401, 407, 601, 602, and 604 of the Civil Rights Act of 1964, 78 Stat. 246. They are printed in Appendix A, *infra*.

STATEMENT.

Each of the petitioners is a local school board in Jefferson County, Alabama. These actions were commenced by complaints filed in the spring of 1965.[3] The

[3] The Bessemer complaint was filed on May 24, 1965, the Jefferson complaint on June 4, 1965, and the Fairfield complaint on July 21, 1965.

District Court, per Judges Lynne and Grooms, granted (with virtual consent of defendant's counsel)[4] the relief as prayed and ordered the submission of desegregation plans. The plans filed by the Boards several days thereafter were considered by the District Court to be consistent with the requirements of the Fifth Circuit's decisions as of that time,[5] and the objections of the plaintiffs and the United States accordingly were overruled. Appeals from these orders were taken in the Bessemer and Jefferson cases and on August 18, 1965, the Court of Appeals remanded each for consideration in light of two recent Fifth Circuit decisions. In accordance with the mandates of the Court of Appeals, the plans in **Bessemer** and **Jefferson** were amended on August 27, 1965, and on the same day the District Court held the amended plans to be in compliance with the Fifth Circuit decisions and entered orders overruling objections to them.[6]

The present appeals were taken by the United States from the orders of overruling objections entered on August 27, 1965, in **Bessemer** and **Jefferson**, and on August 18, 1965 in Fairfield.[7] The Negro plaintiffs never appealed

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[4] See, for example, Record, Vol. II, pp. 127-28.

[5] And they were consistent with the Fifth Circuit decisions. See, *e. g.*, **Armstrong v. Board of Ed. of Birmingham**, 323 F. 2d 333, 333 F. 2d 47; **Lockett v. Board of Ed.**, 342 F. 2d 225 (5th Cir. 1965).

[6] The plans contained no provision for faculty desegregation, but they were filed and the present appeals were taken from orders entered before this Court's decision in **Bradley v. School Board of City of Richmond**, 382 U. S. 103 (1965), and **Rogers v. Paul**, 382 U. S. 198 (1965), and at a time when the Fifth Circuit did not require provisions for faculty desegregation, see **Lockett v. Board of Ed.**, supra.

[7] Because of this Court's often expressed concern for time in school cases, the considerable lapse of time between the date of the orders appealed from and the date of the Fifth Circuit's decision now sought to be reviewed deserves an explanation. Much of the delay is attributable to the United States

from these orders. They moved to intervene, however, when the appeals were set for argument.

These three cases were consolidated on appeal with four cases involving Louisiana school boards, and a panel of the Court of Appeals rendered a decision (with one dissent) reversing all of the cases and directing the District Courts to enter a uniform decree appended to its opinion. A petition for rehearing en banc was granted and on March 29, 1967, a majority of the court en banc entered a per curiam opinion adopting the panel's opinion and decree with minor "clarifying statements". Three members of the Court dissented and one concurred in the reversal but disagreed with the substance of the opinion.

Although the two majority opinions discussed many questions, their substance was that Southern school systems have, by reason of their previous practice of segregation, a constitutional duty to achieve what the court termed "substantial-integration", which is to be measured by the numerical or percentage results obtained. Overruling its prior decisions holding that the Fourteenth Amendment only prohibits enforced segregation but does not compel actual integration, the court held further that an unrestricted "freedom of choice" plan is constitutionally inadequate unless it achieves the required results. The decision and decree were intended to be applicable uniformly to all school systems in the circuit.

The original desegregation plans and the facts appearing before the District Court are not only out-of-date but

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which utilized through extensions the maximum permissible time for noticing and docketing the appeals—thereby consuming a period of some seven months before the appeals were docketed. The cases were argued before the panel on May 23, 1966, and another seven months elapsed before the decision was rendered on December 29, 1966. Arguments on rehearing en banc were heard on March 10, 1967, and the judgments on rehearing entered on March 29.

are immaterial to the decision of the court below and to the issues raised in this petition. They are out-of-date because the appeals were taken immediately after adoption of the plans and before they could be administered or their effects could be gauged. The record therefore does not reflect the changes adopted by the Boards in their administration and resulting in their liberalization.[8] More important, the only facts either material to or mentioned in the decision below were that the school systems involved (as well as all other systems in the South) were previously segregated by law and that the numerical results of their plans were insufficient. The opinion was not premised on any determination that the petitioners were **still** operating "de jure" segregated schools at the time of the decision, but on the fact that they **previously** had "de jure" segregation. The decision did not purport to be merely based on or limited to any factual circumstances peculiar to only the particular school boards which were parties. It was based instead on broad constitutional principles which are intended to govern all school systems in the circuit without regard to variations in details of factual circumstances. Likewise, the existence of the good faith of the school boards is immaterial to the decision. The only test of the constitutional adequacy of a board's desegregation efforts is the objective results, not whether the board has acted in good faith. The opinion does not mention the existence or absence of good faith by the petitioner boards, and the records of the present cases in the District Court contain nothing evidencing anything other than good faith.[9]

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[8] As they have been administered since the appeals were taken, the plans have afforded all students an annual right to choose any school in the systems. This right has not been limited by any tests or other criteria of any sort. So far as we are aware, no student's choice has been denied for any reason.

[9] The plans adopted by the petitioner boards at the time of these appeals in 1965 were held by the District Court to conform with the Fifth Circuit's previous decisions.

Nor are the nature of the plans adopted in 1965 or the evidence in the District Court material to the issues raised by this petition.[10] Petitioners do not contend now, and did not maintain in the court below, that certain details of those plans are now sufficient in the light of developments in the law subsequent to the appeals, such as the decisions concerning faculty desegregation. The points raised here thus are not that the old plans are facially adequate, but that the new constitutional standards required by the Fifth Circuit are improper—particularly as they relate to the student assignments.

REASONS FOR GRANTING THE WRIT.

Petitioners are fully aware of the extent of the Fifth Circuit's experience with school desegregation suits. As its opinions themselves recognize, however, its decision in the present cases marks a far-reaching and substantial departure from any previous decision by it or any other federal appellate court. It admittedly establishes for this circuit new concepts of the nature of the constitutional standards and the forms of remedy which will govern public schools. Particularly with regard to questions of student assignment, it is believed that the constitutional standard adopted by the Court of Appeals is based on a misconception of the fundamental nature of the constitutional right established in **Brown v. Board of Education.** In any event, however, the decision is in direct conflict in this respect with recent desegregation decisions of the

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[10] There was evidence in the District Court on behalf of the respondents aimed at showing the physical inferiority of predominantly Negro schools. Due to insufficient time, however, the District Judge was unable to allow the petitioner an opportunity to present evidence in rebuttal (See Record, Vol. II, pp. 259, 265, 267). Accordingly, when petitioners disputed on appeal that the schools were inferior, counsel for the United States, Mr. David Norman, acknowledged during the original oral argument that the cases should be remanded for further evidence on this question.

Fourth and Eighth Circuits and conflicts at least in principle with decisions of other circuits. Moreover, its importance is clear: the decision and the detailed decree affect not only the petitioners but are expressly directed by the court to be followed by every school system in the six states comprising the circuit; and by reason of the principles on which it is premised, it unquestionably would apply to most of the school systems in the Fourth and Eighth Circuits and should apply to school systems in every other circuit in which schools with racial concentrations now exist.

I.

The Requirement by the Decision Below of Substantial Quantitative Integration Is Erroneous and Conflicts With the Decisions of the Other Circuits.

A. The Decision Imposes New Constitutional Duties on the Schools and on the Students.

Despite its length and discussion of numerous subsidiary questions, the decision of the court of appeals rests on several fundamental points. The most basic is its determination that the Fourteenth Amendment and decisions of this Court require the achievement of "substantial-integration" in terms of favorable statistics showing the numbers of Negro children who attend certain schools. Corollarily, it holds that a so-called freedom-of-choice method of student assignment—and, indeed, any other method of assignment—is constitutionally insufficient in Southern states unless it results in "substantial-integration." A subsidiary but related point underlying the decision is that the constitutional requirement of "substantial-integration" applies only to schools in states which **previously** permitted or required school segregation by law (characterized as "de jure segregation") but not

to schools in states which in 1954[11] had no laws requiring or permitting segregation (characterized as "de facto segregation"). Also related is its reliance on Title VI of the Civil Rights Act of 1964 as a congressional recognition of a requirement of substantial-integration in the Southern school systems but not in the North. Another major aspect is the decision for the first time in any school case that a minutely detailed decree be dictated by an appellate court for uniform use by all school systems in the circuit without reference to or regard for local differences and needs.

The main thrust and basis of the decision are that the Fourteenth Amendment requires in the South "substantial-integration" and that any means of student assignment in the South is unconstitutional if it does not meet that requirement. Its keystone is the principle reiterated throughout the opinion that, "The only school desegregation plan that meets constitutional standards is one that **works**,"[12] and that, "As the Constitution dictates, the proof of the pudding is in the eating: the proof of a school board's compliance with constitutional standards is the **result**."[13] The nature of this constitutional duty and the court's meaning of one that "works" is explained as being that:[14]

> [T]he law imposes . . . an **absolute duty to integrate** in the sense that a **disproportionate concentration of Negroes** in certain schools cannot be ignored; racial

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[11] Thus, it distinguishes **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir., 1964), on the ground that it involved "de facto" segregation even though that school system had operated segregated schools permitted by law as late as 1949 (page 63; 372 F. 2d at 873).

[12] Page 7; 372 F. 2d at 847.

[13] Page 112; 372 F. 2d at 894.

[14] Page 6, n. 5; 372 F. 2d at 846-47.

> mixing of students is a high priority educational goal. The law does not require a maximum of racial mixing or striking a racial balance accurately reflecting the racial composition on the school population. It does not require that each and every child shall attend a racially balanced school. This, we take it, is the sense in which the Civil Rights Commission used the phrase "substantial-integration."

The decision then predicates the achievement of "substantial-integration" and the constitutionality of a school system on the attainment of prescribed percentages of Negro students in attendance at schools with whites:[15]

> In reviewing the effectiveness of an approved plan it seems reasonable to use some sort of yardstick or objective percentage guide. The percentage requirements in the [HEW] Guidelines are modest, suggesting only that systems using free choice plans for at least two years should expect 15 to 18 per cent of the pupil population to have selected desegregated schools.

Finally, if these quantitative results are not achieved, the decision requires the adoption of whatever means are necessary to accomplish them. The panel's opinion thus concludes:[16]

> If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park.

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[15] Page 95; 372 F. 2d at 115.

[16] Page 115; 372 F. 2d at 895-96.

Adopting the panel opinion, the rehearing opinion added with regard to the percentage requirements:

> The percentages are not a method for setting quotas or striking a balance. If the plan is ineffective, longer on promises than performance, the school officials charged with initiating and administering a unitary system have not met the constitutional requirements of the Fourteenth Amendment; they should try other tools.

The substance of the decision, then, is that while the achievement of a perfectly proportionate balance is not necessarily required, yet the elimination of imbalance and the achievement of a certain prescribed degree of "racial mixing" ("substantial-integration") is constitutionally mandated.[17]

In the context of an unrestricted "free choice" plan, the concomitant to this requirement is that a similar duty is constitutionally required equally of the children (colored and white) as of the school officials and that the achievement of "substantial-integration" is required without regard to—and, indeed, notwithstanding—the students' individual choices and preferences. School officials are required to compel all children to attend certain schools to the end that "substantial-integration" may be achieved, notwithstanding that the children have affirmatively chosen the schools they attend. If their choices do not measure up to the court's concept of "substantial-integration," a means of assignment must be adopted which will force them elsewhere. Realizing this effect of its decision, the rehearing opinion concludes: "A school child has no inalienable right to choose his school." This

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[17] Of course, whether the percentage requirements are characterized as a "rule of thumb" or as a strict condition is immaterial to the fundamental constitutional question which they raise—whether the Fourteenth Amendment requires quantitative results.

conclusion evidently is based upon the court's reading of the **Brown** decisions and the Fourteenth Amendment as subordinating the rights of individual Negro students to a theoretical group right of "Negroes as a class" to an integrated education.[18]

These principles not only form the basis of the decision, but also are manifested in certain provisions of its uniform decree. Thus, Section II (d) of the decree already requires the replacement of freedom of choice with a geographic zone or a neighborhood school assignment plan subject to a right of transfer through exercise of the choice procedures; it requires assignments by residence unless a student affirmatively chooses to go elsewhere.[19]

The practical effect of blindly requiring quantitative integration without regard to other considerations can be demonstrated by the results of the choices made in the Bessemer system for the 1967-68 school year—which will be the third year Bessemer has used freedom of choice. The choice period was held from May 1 to June 1, 1967, and all of the requirements of publicity, letters, forms, etc., dictated by the Fifth Circuit's uniform decree were followed. All grades were included. Of the total Negro enrollment of 5,127 in the Bessemer schools, the number of students returning their choices was 3,348. Of that number, only 146 chose to attend predominantly white schools. A total of 3,202 Negro students affirmatively

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[18] This view of **Brown** as a governing basis of the decision is evident throughout the panel's opinion and is discussed there in detail at pages 46-59, 372 F. 2d at 866-70. For example, it maintains that the "right of the individual plaintiffs must yield to the overriding right of Negroes as a class to a completely integrated public education." It is never explained who comprises this class if it is not the individual Negroes.

[19] Section II (d) provides in pertinent part that:

"Any student who has not expressed his choice of school within a week after school opens shall be assigned to the school nearest his home where space is available. . . ."

chose to remain in their former schools. The percentage "results" are: only 4.17% of the students in Bessemer have selected desegregated schools.[20] Since this of course falls far short of the Court's concept of "substantial-integration" as demanding that "15 to 18 percent" of the pupils select desegregated schools in systems using free choice plans for two years, the decision expects the Bessemer system to adopt **now** another method of assignment which will accomplish the required results. In doing so it presumably will override the expressed choices of the 3,202 Negro students who elected to remain in their present schools and compulsively assign them elsewhere.

In assessing the meaning of this, it is to be noted that the personal reasons actually motivating the students' choices are not revealed anywhere in these cases, were not considered or mentioned by the Court of Appeals, and indeed are rendered altogether irrelevant by its determination that the quantitative result is the only constitutional concern. It seems impossible to read any such meaning into **Brown** unless the Court of Appeals is interpolating a **conclusive** presumption that the choices made by the Negro children were caused solely by fear, intimidation, or other extraneous pressures. But there is not the slightest indication in fact that the choices made by students in the petitioner systems have been influenced by anything except genuine preference. On the contrary, a recent report of the United States Commission on Civil Rights[21] reveals that reasons given by Negro children in actual interviews included the desire to remain with their friends, to continue their participation in school activities, and a feeling of identification with and pride in a particular school for the usual reasons any student identi-

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[20] This includes 67 other students who attended predominantly white schools last year and will return next fall.

[21] **Survey of School Desegregation in the Southern and Border States, 1965-66** (Feb. 1966).

fies himself with the school he attends.[22] However unimportant these reasons might seem in comparison with other educational purposes, it hardly seems proper for a court to arrogate to itself, especially under the guise of enforcing constitutional rights, the authority to determine that the Fourteenth Amendment prohibits a child from associating with his friends. Since there has been no opportunity for any evidentiary determination as to whether freedom of choice in the present school systems does not in fact serve the preferences and interests of the students, no one (including the court below) is in a position now to adequately appreciate or anticipate the actual effect which the court's requirement of quantitative results will have on the students themselves.[23]

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[22] See also, Bickel, "The Decade of School Desegregation," 64 **Colum. L. Rev.** 193, 213-15 (1964).

[23] The danger of such precipitate action by an appellate court on the basis of theoretical concepts and without consideration of individual factual circumstances is illustrated by an occurrence this spring in the school system of Okaloosa County, Florida. There, in accordance with a desegregation plan adopted pursuant to H. E. W. requirements, the school system closed a formerly all Negro high school (Combs) and assigned all its 107 Negro students to a formerly all white high school for the 1966-67 school year. On May 9th, the Civic League of Fort Walton Beach, a Negro organization, petitioned the school board to reopen the closed Negro high school and to allow the return of its Negro students. The Negro spokesman explained that they were "not fighting integration, but rather wanted each student to have **the right to attend whatever school he wishes.**" Fort Walton Beach, Florida "Playground Daily News," May 10, 1967, p. 1, col. 4. The basis of their request, as set forth in the petition, was that of the 107 Negro students who had previously attended Combs school but were required to attend a different school this year, 46 had dropped out of school as of March 3 (Page 30 of the Petition filed with the Board of Public Instruction of Okaloosa County, Florida). This was stated by the Negroes' petition to represent an increase of 2,033% in the number of dropouts in the Negro students formerly attending Combs High School during the 1966-67 school year as compared with the school years from 1962 to 1966. *Ibid.* The Negro organization submitted to each of the 46 dropouts questionnaires which revealed that all 46 wanted a high school education and wanted to return to Combs

In order to reach its conclusion that the Constitution absolutely compels quantitative integration, it was necessary for the Fifth Circuit to expressly overrule previous decisions which until then had consistently interpreted **Brown** as meaning that, "The equal protection and due process clauses of the Fourteenth Amendment do not affirmatively command integration, but they do forbid any state action requiring segregation on account of their race or color of children in the public schools."[24] The court recognized that in doing so it was departing from its previous concept of the controlling constitutional standards: "Expressions in our earlier opinions distinguishing between integration and desegregation must yield to this affirmative duty we **now** recognize."[25] The importance of this departure to the decision is indicated by the fact that the opinion devotes no less than 35 pages[26] to an attack on its prior interpretation of

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High School. *Id.*, at 22, 23. This information and a copy of the petition were obtained on May 22 from the attorney for the Board of Public Instruction of Okaloosa County, Florida, Mr. Erwin Fleet of Fort Walton Beach. It is difficult to see how the "educational opportunity" of these 46 children was improved by their compelled attendance at the predominantly white school.

[24] **Boson v. Rippy,** 285 F. 2d 43, 48 (5th Cir. 1960) (Rives, C. J.). The en banc opinion lists nine of its former decisions which it overruled, and there are others to the same effect which it did not list. Similar examples of statements in the Fifth Circuit decisions are: "Nothing contained in this opinion . . . is intended to mean that voluntary segregation is unlawful; or that the same is not legally permissible." **Armstrong v. Board of Education of City of Birmingham,** 323 F. 2d 333, 339 (5th Cir. 1963) (Rives, J.); "No court has required a 'compulsory racially integrated school system' to meet the constitutional mandate that there be no discrimination on the basis of race in the operation of public schools. . . . The interdiction is against enforced racial segregation." **Stell v. Savannah-Chatham County Board of Education,** 333 F. 2d 55, 59 (5th Cir. 1964) (Bell, J.).

[25] Rehearing opinion, p. 5.

[26] pp. 28-73; 372 F. 2d at 861-78.

Brown as similarly expressed (and still adhered to) in decisions of other jurisdictions—such as **Briggs v. Elliott**, 132 F. Supp. 776 (E. D. S. C. 1955), and **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), **cert. denied**, 377 U. S. 924 (1964). Inasmuch as the central issues and principles of the decision relate to the definition of the essential nature of the rights and duties decreed by **Brown I** rather than mere remedial details, the decision's impact and application extend beyond this circuit.

B. **The Decision Below Conflicts With the Decisions of the Other Circuits in Its Requirements of Mandatory Quantitative Integration.**

Both in its governing constitutional principles and in each of its fundamental requirements discussed above[27] the decision of the Fifth Circuit is in conflict with the decisions of every other circuit which has considered these questions.

1. **Fourth Circuit.** In **Bradley v. School Board of Richmond**, 345 F. 2d 310 (4th Cir.), vacated and remanded on other grounds, 382 U. S. 103 (1965), a majority of the Fourth Circuit sitting en banc approved without qualification a freedom-of-choice method of assignment which the court below now rejects.[28] The Negro appellants

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[27] That the Fourteenth Amendment requires "substantial integration" measured by quantitative results; that the only constitutionally adequate method of student assignment is one which achieves such "results"; that a freedom-of-choice method of assignment is inherently inadequate and must be abandoned if it has failed to achieve those results; and that freedom of choice is permissible only if superimposed on geographical zones.

[28] The Richmond plan, as described in 345 F. 2d at 315, provided "for a freedom-of-choice by every individual in the Richmond School system as to the school he attends. There also is a requirement that the choice be affirmatively exercised by every pupil entering the system for the first time and by every other pupil as he moves from one level to another." It is the same plan which petitioners unsuccessfully urged the Fifth Circuit to approve in the present cases.

urged that it be rejected for reasons similar to those on which the decision of the Fifth Circuit is based. In reply to the appellants' insistence that the plan was unconstitutional because the preferences of Negro parents for predominantly Negro schools "result[ed] in the continuance of some schools attended only by Negroes," the Fourth Circuit concluded (*Id.* at 316):

> It has been held again and again, however, that the Fourteenth Amendment prohibition is not against segregation as such. The proscription is against discrimination. . . . There is nothing in the Constitution which prevents his voluntary association with others of his race or which would strike down any state law which permits such association. The present suggestion that a Negro's right to be free from discrimination requires that the state deprive him of his volition is incongruous. . . . There is no hint [in **Brown**] of a suggestion of a constitutional requirement that a state must forbid voluntary associations or limit an individual's freedom of choice except to the extent that such individual's freedom of choice may be affected by the equal right of others. A state or a school district offends no constitutional requirement when it grants to all students uniformly an unrestricted freedom of choice as to schools attended, so that each pupil, in effect, assigns himself to the school he wishes to attend.

To their contention that a freedom of choice plan is adequate only if it is combined with geographic assignments based on residence, as provided in Section II (d) of the Fifth Circuit's decree, the Fourth Circuit concluded (*Id.*, at 318-19):

> We find, however, that an underlying geographic plan is not a prerequisite to the validity of a freedom of choice plan. A system of free transfer is an acceptable device for achieving a legal desegregation

> of schools. Its acceptability is not dependent upon the concurrent use of some other device which also might be adequate. . . . Imposed discrimination is eliminated as readily by a plan under which each pupil initially assigns himself as he pleases as by a plan under which he is involuntarily assigned on a geographic basis. . . . The other means [in addition to geographic zoning] of abolishing the dual zone system was to do away with zones completely. From the point of view of the ultimate objective of eliminating the illegal dual zoning, dezoning seems the obvious equivalent of rezoning and, administratively, far easier of accomplishment when the School Board intends ultimate operation to be founded upon the free choice of the pupils.

For its holding, the Fourth Circuit relied explicitly on **Briggs v. Elliott**, 132 F. Supp. 776 (E. D. S. C. 1955), which the Fifth Circuit concluded to be inconsistent with the constitutional requirements imposed by **Brown**. The completely opposite results were reached by the Fourth and Fifth Circuits in factual circumstances that were identical insofar as they are material to the decision. The basis of the Fifth Circuit's decision that there is a constitutional duty throughout the Fifth Circuit to achieve "substantial integration" is that everywhere in the South (including Richmond, Virginia), due to "formerly de jure" segregation, "the separation **originally** was racially motivated and sanctioned by law."[29]

Demonstrating more clearly its direct conflict with the decision below are the Fourth Circuit's recent en banc decisions in **Bowman v. County School Board of Charles City County, Va.**, F. 2d (4th Cir., June 12, 1967), and **Green v. County School Board of New Kent County, Va.**,

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[29] See, e. g., Panel Opinion, page 77; En Banc Opinion, page 5, n. 1.

F. 2d (4th Cir., June 12, 1967), which are printed as Appendix B, *infra*. None of the school systems involved in those cases adopted any plan of desegregation until after the commencement of suits in 1965. As the result of those suits, each board adopted a freedom of choice plan identical to that approved in **Bradley**—providing only for permissive choices except when a student initially entered the system or progressed to another school level. It is evident from the opinions that the Negro appellants challenged the adequacy of the plans on the same grounds on which the Fifth Circuit's decision is based. Directly contrary to the decision below, a majority of the Fourth Circuit held:

> In this school case, the Negro plaintiffs attack, as a deprivation of their constitutional rights, a "freedom of choice" plan, under which each Negro pupil has an acknowledged, "unrestricted right" to attend any school in the system he wishes. They contend that compulsive assignment to achieve a greater intermixture of the races, notwithstanding their individual choices, is their due. We cannot accept that contention . . .
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> If each pupil, each year, attends the school of his choice, the constitution does not require that he be deprived of his choice unless its exercise is not free. This we have held and we adhere to our holdings.

Although the majority opinion of the Fourth Circuit considered its decision to be consistent with the requirements of the decree formulated by the Fifth Circuit in the present cases, it clearly did not purport to adopt the objective of substantial quantitative integration as a constitutional duty, and the concurring opinion of Judges Sobeloff and Winter leaves no doubt that the Fourth Circuit's decision conflicts with the decision below in every major constitu-

tional point which petitioners now raise regarding pupil assignment. Most notably, it is pointed out that the Fourth Circuit's decision does not require mandatory annual choices with provision for compulsive assignments "to the school nearest his home" in event of a student's failure to exercise a choice, that it does not contemplate that the sufficiency of a free choice plan be measured by consideration of quantitative results, and that it does not require that freedom of choice be replaced if it does not result in actual integration. The concurring opinion also points out that the Fourth Circuit continues to follow and apply the principles in **Briggs v. Elliott**, in determining the constitutional adequacy of desegregation plans. In short, there is absolutely no way the Fourth Circuit's decisions can be squared with that of the Fifth.

2. **Eighth Circuit.** The Eighth Circuit recently has expressly rejected each of the major premises which the Fifth Circuit sustained. **Clark v. Board of Education of Little Rock School Dist.**, 369 F. 2d 661 (4th Cir. 1966), rehearing denied 374 F. 2d 569 (8th Cir. 1967). The assignment features of the plan approved by the Eighth Circuit in **Clark** were the same as those in the Fourth Circuit decisions: an unrestricted freedom-of-choice plan with no provision for geographic assignments on failure to make a choice. The court rejected the contention that the constitutionality of a plan depends upon whether it "works" in achieving numerical results (369 F. 2d at 666):

> Thus, they [plaintiffs] argue that the "freedom of choice" plan is not succeeding in the integration of the schools.
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> Though the board has a positive duty to initiate a plan of desegregation, the constitutionality of that plan does not necessarily depend upon favorable statistics indicating positive integration of the races. . . . The system is not subject to constitutional ob-

jections simply because large segments of whites and Negroes choose to continue attending their familiar schools.

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In short, the constitution does not require a school system to force a mixing of the races in schools according to some predetermined mathematical formula. Therefore, the mere presence of statistics indicating absence of total integration does not render an otherwise proper plan unconstitutional.

Regarding the validity in general of a freedom-of-choice plan of the sort which petitioners urged the Fifth Circuit to allow, the Eighth Circuit concluded:

> Notwithstanding the H. E. W. Guidelines and the recent opinion of the Fifth Circuit [in **Jefferson County**], when a student is given a well publicized annual right to enter the school of his choice, coupled with periodic mandatory choices as set forth in the Board's amended plan, we can find on the face of it no unconstitutional state action. We find no state act that results in discrimination against Negroes [374 F. 2d at 571].
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> Therefore, if in fact all the students wishing to transfer were fully accommodated, the constitution would unquestionably be satisfied . . . [374 F. 2d at 572].
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> If all of the students are, in fact, given a free and unhindered choice of schools, which is honored by the school board, it cannot be said that the state is segregating the races, operating a school with dual attendance areas or considering race in the assignment of students to the classrooms. We find no unlawful discrimination in the giving of students a free choice of schools [369 F. 2d at 666].

With respect to the contention that a free choice plan must provide for a mandatory annual choice with geographic assignments on failure to choose, the Eighth Circuit stated:

> They are afforded an annual right to transfer schools if they so desire. The failure to exercise this right does not result in the student being assigned to a school on the basis of race. Rather, the student is assigned to the school he is presently attending, by reason of a choice originally exercised solely by the student [369 F. 2d at 668].
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> On its face, we believe that the plan, as approved by us, is proper and constitutional, and appellants have made no showing that this non-mandatory freedom of choice plan to laterally transfer schools has infringed their constitutional rights [374 F. 2d at 571].

It is true that in rejecting the Fifth Circuit's present decision, the Eighth Circuit commented that the "factual situation" was different in that the Fifth Circuit was "still dealing with dual attendance zones" and that "a much greater degree" of integration has been achieved in Arkansas than the states "directly concerned" in the Jefferson County decision. However, the Fifth Circuit's decision was based upon much broader grounds than any factual differences between Arkansas and the six states comprising the Fifth Circuit—namely, that racial concentrations in Southern schools (including those in Arkansas) were originally caused by legally enforced dual school systems, and that Southern schools therefore have an affirmative duty to do whatever is necessary to eliminate the disproportionate concentrations which are deemed to be vestiges of the dual system. The Fifth Circuit's decision was not based on any notion that the petitioner Boards continue now to have "de jure" segregation, but

on the theory that all "cases in this circuit involve **formerly** de jure segregated schools" (*E. g.*, Panel Opinion, p. 39). The Fifth Circuit's decision was not based on and did not involve dual attendance **zones**, which admittedly are eliminated by freedom of choice plans, but was concerned solely with what it considered to be vestiges of the dual school **system**. Further, the degree of integration in Arkansas schools generally and in Little Rock specifically is not so "much greater" as to avoid application of the Fifth Circuit's decision. Appendix A 1 to the Report of the United States Commission on Civil Rights, **Racial Isolation in Public Schools** (1967), lists the following as the percentages of total Negro elementary students attending schools with 90 to 100 per cent Negroes in sample Arkansas cities: Little Rock, 95.6%; Forrest City, 98.3%; Helena, 99.5%; Jonesboro, 98.6%; Marvell, 98.1%; Pine Bluff, 98.2%; Hot Springs, 90.6%. Quite plainly, none of the Arkansas schools approach achievement of the "substantial-integration" (15% to 18% after two years) required by the Fifth Circuit's decision. Moreover, the Fifth Circuit's decision is made expressly applicable to every school system in this Circuit, including states and communities in which the degree of percentage integration is equivalent to or quite substantially larger than that in Arkansas.[30]

3. **Sixth Circuit.** The petitioners in **Deal v. Cincinnati Board of Education**, No. 1358, October Term, 1966, assert in their petition for certiorari that the Sixth Circuit's decision in **Deal v. Cincinnati Board of Ed.**, 369 F. 2d 55 (6th Cir. 1966), is in conflict with the Fifth Circuit's decision below. We agree. The **Deal** decision rests on that circuit's interpretation of **Brown** as holding that the very

[30] For example, the 1966-67 statistical summary compiled by the Southern Education Reporting Service shows for the 1966-67 school year that the percentage of Negro enrollment in schools with whites was 44.9% in Texas, 22.3% in Florida.

right which is accorded constitutional protection is the individual student's freedom of choice, and that the Fourteenth Amendment operates only to prohibit "enforced segregation" impinging on that freedom of choice.[31] The decision of the Fifth Circuit, to the contrary, is based on the totally inconsistent interpretation of **Brown** resulting in its conclusion that "freedom of choice is not a goal in itself" and that "a school child has no alienable right to choose his school," and indeed that in order to effectuate a goal of "substantial-integration" the Constitution affirmatively requires restriction on freedom of choice for the individual by compelling his assignment to other schools. See also **Kelley v. Board of Education of City of Nashville**, 270 F. 2d 209 (6th Cir. 1959), where the Sixth Circuit applied the same principles in the context of a desegregation plan adopted by a school system which previously had a "de jure" segregated system.

4. **Other Circuits.** A number of other circuits have held uniformly that neither the Fourteenth Amendment nor this Court's decisions require school systems to eliminate or relieve racial concentrations or imbalances in certain schools not shown to result from purposeful and enforced

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[31] The Sixth Circuit thus concluded in **Deal**:

"The principle thus established in our law [by **Brown** and subsequent decisions] is that the State may not erect irrelevant barriers to restrict the full play of individual choice in any sector of society. **Since it is freedom of choice that is to be protected,** it is not necessary that any particular harm be established if it is shown that the range of individual options had been constricted without the high degree of justification which the Constitution requires."

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"The element of inequality in **Brown** was the unnecessary restriction on freedom of choice for the individual, based on the fortuitous, uncontrollable, arbitrary factor of his race.

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"We read **Brown** as prohibiting only enforced segregation" [369 F. 2d at 59, 60].

segregation by the school boards. **Springfield School Committee v. Barksdale**, 348 F. 2d 261, 264 (1st Cir. 1965); **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), **cert. denied**, 377 U. S. 924 (1964); **Downs v. Board of Education of Kansas City**, 336 F. 2d 988 (10th Cir. 1964), **cert. denied**, 380 U. S. 914 (1965). That several of these cases involved school systems operated on a neighborhood school basis rather than freedom of choice does not lessen the conflict in controlling constitutional principle or indeed in fact. To conveniently distinguish them with the facile label of "de facto" segregation is not only overly simplistic but avoids the fundamental principles of constitutional interpretation on which the Fifth Circuit's decision is based. The Fifth Circuit's decision is not based on any finding that the petitioners or other school systems in this circuit continue now to operate "de jure" segregated schools or that they now engage in purposeful segregation or discrimination. And it could not have been, since unrestricted free choice plainly is not legally enforced segregation. Rather, it held that a duty to achieve "substantial-integration" to eliminate "disproportionate racial concentrations" extended to them because of their "formerly de jure" segregation.[32] Its constitutional theory is that despite freedom of choice, the existence of schools with racial imbalances can be traced to past practices of segregation. The court below accordingly recognized the similarity between what is termed "pseudo de facto segregation in the South," in the form of continued isolation caused by the students' choices, and what it called "actual de facto segregation in the North."[33] Yet, the similar degree of racial imbalance in northern schools can be traced to the same or similar causes. Indeed, the Civil Rights Commission observes in its most recent report:[33a]

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[32] Panel Opinion, pp. 14, 39.

[33] Panel Opinion, p. 68.

[33a] **Racial Isolation in the Public Schools**, p. 42 (1967).

"These cases [involving Northern schools] appear to be the legacy of an era, recently ended in some places in the North, when laws and policies explicitly authorized segregation by race. State statutes authorizing separate-but-equal public schools were on the books in Indiana until 1949, in New Mexico and Wyoming until 1954, and in New York until 1938. Other Northern states authorized such segregation after the Civil War and did not repeal their authorizing statutes until early in the 20th century."

The Civil Rights Commission report goes on to cite examples in a number of states and cities, including Cincinnati, Ohio, Illinois, Kansas, New Jersey and other places where segregated schools were operated by law or custom, some as recently as 1952 and 1954—the very places involved in the **Deal, Bell, Downs,** and other cases cited above. As the dissenting opinion of Judge Gewin in the present cases points out, the principles on which the decision below is based apply equally to the circumstances in **Bell v. School City of Gary,** supra, since, as the district court there observed (213 F. Supp. at 822), Gary, Indiana, had operated a segregated dual system until 1949. The only real distinction between those cases and this one is that involved school systems which assigned students to neighborhood schools, whereas here the students have freedom of choice. However, it has been observed that the relatively recent creation of neighborhood schools in the North was racially motivated from the outset. As stated by Dr. Max Wolff, Senior Research Sociologist for the New York Center for Urban Education:[34]

"The neighborhood school concept arose in the twenties of this century, responding to the widespread migration of Negroes to the North after World War I."

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[34] Dr. Max Wolff, "The Educational Park," Conference on Education and Racial Imbalance in the City, page 4 (March, 1967).

There simply is no distinction in constitutional principle between the segregation existing in the North and that in the Fifth, Fourth, and Eighth Circuits. Everywhere, North and South, school segregation is the result of a complex variety of socio-economic causes and conditions including, both North and South, past official policy and practices of school segregation.[35] Certainly to a greater degree than free choice methods of assignment in the South, strictly administered neighborhood school policies in the North involve official participation by school officials in the creation and perpetuation of schools with "disproportionate racial concentrations."[36] The Fifth Circuit's decision now holds that there is a constitutional duty applicable to all school systems in the South to eliminate racial imbalance resulting from choices made by students. Meanwhile, Northern cities with equally disproportionate racial concentrations in their schools[37] and with substantially equivalent or greater disparities in physical facilities and pupil-teacher ratios as in the South[38] remain untouched by any duty under the Fourteenth Amendment to achieve the quantitative integration

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[35] United States Commission on Civil Rights, Racial Isolation in the Public Schools, pages 200-02.

[36] The Civil Rights Commission thus concludes that, "geographical zoning, the most commonly used form of student assignment in Northern cities, has contributed to the creation and maintenance of racially and socially homogenous schools." *Id.*, at 202.

[37] See Appendix A. 1, Report of U. S. Commission on Civil Rights, **Racial Isolation in the Public Schools** (1967).

[38] See Southern Education Report, page 4 (May, 1967), setting forth a comparison of the physical characteristics of schools attended by Negro and white students in the whole nation and in the South, compiled from Table 2, page 11, of the U. S. Office of Education Report, **Equality of Educational Opportunity** (1966). It is revealed there, for example, that whereas the average pupils per room in the whole nation is 34 for Negro students and 31 for white, in the metropolitan South it is only 30 for Negro students and 34 for white.

which the Fifth Circuit now requires of the South. We do not believe the Constitution is capable of such sectionalization. If there exists any constitutional duty to achieve "substantial integration", there is no basis in fact or principle why the same duty does not govern Northern school systems with segregated schools resulting from substantially the same causes and having substantially the same characteristics as those in the South. We submit, therefore, that the decision of the Fifth Circuit is in conflict in both principle and fact with the decisions of other circuits involving so-called "de facto" segregation. The conflict is compounded by the fact that all of these decisions of other circuits expressly rely on the constitutional principles in the prior decision of the Fifth Circuit which are now expressly overruled by the decision below.

The Tenth Circuit's recent decision in **Board of Education of the Oklahoma City Public Schools v. Dowell,** F. 2d (8th Cir., January 23, 1967), **cert. denied,** 35 U. S. L. Week 3418 (U. S. May 29, 1967), does not remove or lessen this conflict. **Dowell** involved a strictly enforced geographic zoning method of assignment, not freedom of choice. The district court's order did not require or contemplate the achievement of "substantial integration" and did not compel any student to attend a school for the purpose of achieving integration. Indeed, the major innovation by the district court was a form of free choice —"majority to minority" transfer provision which merely **permitted** students to choose a school outside of their zone. The district court's order was based upon an expressed finding of bad faith and a detailed evidentiary study of the propriety of the plan it adopted to the peculiar circumstances of the Oklahoma City system; it was not based on the broad concept of a constitutional duty applying uniformly to all school systems in the circuit regardless of good faith and local circumstances, as was

the decision of the Fifth Circuit. The Tenth Circuit's affirmance was predicated expressly on the district court's finding of bad faith, and it was on this ground that it distinguished its former decision in **Downs**. The Tenth Circuit's decision in **Dowell** was very narrow and did not purport to establish any new concept of constitutionnal law consistent with that adopted in the present cases by the Fifth Circuit. On the contrary, it expressly re-affirmed its decision in **Downs**, where it had said:

> Appellants also contend that even though the Board may not be pursuing a policy of intentional segregation, there is still segregation in fact in the school system and under the principles of Brown v. Board of Education, supra, the Board has a positive and affirmative duty to eliminate segregation in fact as well as segregation by intention. While there seems to be authority to support that contention, the better rule is that although the Fourteenth Amendment prohibits segregation, it does not command integration of the races in the public schools and Negro children have no constitutional right to have white children attend schools with them.

C. In Holding That There Is an Absolute Duty to Achieve Substantial Quantitative Integration, the Decision Below Is Erroneous and Conflicts With Decisions of This Court.

The Fifth Circuit's decision seems to be bottomed on an interpretation of this Court's decisions as establishing a "governmental objective of . . . educational opportunities on equal terms to all"[38] which imposes upon the students and schools alike a duty to benefit Negroes as a class[39] even if it requires the subordination of the rights

[38] En banc Opinion, page 6.

[39] E. g., Panel Opinion, pages 47, 50, 51.

and preferences of individual Negro students to the assumed right of the class. Insofar as the decision looks toward the attainment of equal educational opportunities and requires to this end that the dual system be eliminated through elimination of racial distinctions in faculty assignments, activities, and facilities, petitioners have no fundamental quarrel. Insofar as this objective is considered to embrace a duty on children and schools to achieve "substantial-integration", however, petitioners believe the Fifth Circuit has misconstrued the fundamental substance of this Court's decisions.

First, it would seem quite basic that this Court in **Brown I** was concerned with and determined only the **rights** of individuals, as distinguished from any **obligations** of individual Negro students to either their class or to public education generally. Of course it is true that, as the decision below stresses at considerable length, **Brown** was a class action, but the clear intent of **Brown** was to confer the same personal right to all members of the class to the attendance of a school without regard to race—not that the class as a distinct corporate body itself has any right which transcends and subordinates the individual rights of its members. Subsequent decisions of this Court have expressed the personal nature of the right thus conferred upon individual Negroes as members of the class. In **Brown II**, 349 U. S. 294, 300 (1955), it was observed that, "at stake is the **personal** interest of plaintiffs in admission to public schools as soon as practicable on a non-discriminatory basis." In **Cooper v. Aaron**, 358 U. S. 1, 19 (1958), the Court similarly spoke of "the right of a student not to be segregated." No subsequent decision has ever intimated that the individual right is in any way limited by a theoretical right of the class. Underscoring the individuality of the bases of its decision is the important finding in **Brown I** that separation of children "solely because of their race generates

a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." 347 U. S. at 494. But it did not decide "that there must be coerced integration of the races in order to accomplish an educational equality, for this also would require an appraisal of the effect upon the hearts and minds of those who were so coerced."[40] A requirement of "substantial-integration" by which the constitutionality of a desegregation plan is measured by the quantitative results necessarily has the effect of transforming the rights of the individual students as decreed by **Brown I** into an obligation to be assigned to a particular school in order to accomplish educational benefits for the class.

Secondly, an unrestricted freedom of choice plan, if fairly and properly administered, constitutes "a system of determining admission to the public schools on a nonracial basis," which **Brown II** defined as the ultimate object of the remedies to be fashioned for pupil assignment. 349 U. S. at 300-01.[41] It also effectively eliminates any constitutional objection, as expressed in **Rogers v. Paul**, 382 U. S. 198, 199 (1965), based on the fact that students might have been previously "assigned to a Negro . . . school on the basis of their race." For under a freedom of choice plan, their assignments are based solely on their personal choice. Thus, the 3,348 Negro students in the Bessemer system who have made choices for the 1967-68 school year will be attending certain schools not because of "constitutionally forbidden" assign-

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[40] **Olson v. Board of Education of Malverne, N. Y.**, 250 F. Supp. 1000, 1006 (E. D. N. Y. 1966).

[41] Of course, we do not mean to contend that there might not be other aspects of school operations, apart from the manner of student assignment, for which other requirements might be imposed in order to comply fully with **Brown II**. We are speaking here solely of freedom of choice as a constitutionally adequate method of student assignment.

ments based on race but because of their affirmative choices. It likewise effectuates the elimination of "dual school systems," since the school boards no longer maintain a dual system based on race but a system of schools attended by the children who select them. If the choices made by the students result in "disproportionate concentrations of Negroes in certain schools,"[42] there may be a racial imbalance but on its face it is not an imbalance caused by school officials. In requiring that a freedom of choice method of assignment must be abandoned as constitutionally inadequate solely because it does not achieve certain preconceived results, the Fifth Circuit has imposed a duty wholly different from and far exceeding anything contemplated by the decisions of this Court. There is not the slightest intimation in any decision of this court that a freedom of choice method of student assignment is not constitutionally adequate. On the contrary, however, in the few instances in which the Court has had occasion to consider or discuss the adequacy of free choice plans, it has conveyed a distinct impression that they constitute sufficient means of desegregation regardless of the numerical results of their operation—an impression which has been a basis for the consistent approval of similar plans by circuits other than the Fifth Circuit.[43] See **Goss v. Board of Education of City of Knoxville**, 373 U. S. 683, 687, 689 (1963); **Calhoun v. Latimer**, 377 U. S. 263 (1964); **cf. Shuttlesworth v. Birmingham Bd. of Ed.**, 358 U. S. 101 (1958); **Bradley v. School City of Richmond**, 382 U. S. 103 (1965).

Moreover, although the decision below requires the adoption of another means of assignment, there was no

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[42] Panel Opinion, p. 6.

[43] See, *e. g.*, **Bradley v. School Board of City of Richmond**, 345 F. 2d 310, 318 (4th Cir. 1965), vacated and remanded on other grounds, 382 U. S. 103 (1965).

evidence before the court that any other method, such as geographic zoning, would be as effective. Due to residential racial isolation, it is likely that in the South as now in the North a geographic approach will tend only to accentuate racial concentrations in the schools.[44] Indeed, the Civil Rights Commission does not find freedom of choice to be improper if it is properly administered.[45]

Finally, in the context of an unrestricted free-choice plan, the percentage results of themselves evidence neither the state action nor the discrimination necessary to the assertion by the court below of authority under the Fourteenth Amendment to compel a change in the method of assignment. Unless it be shown that the choices made by the students are influenced in some way by school officials or that they do not reflect the students' actual preferences, any resulting racial imbalance is due to the students' actions. In its conclusion that percentage results constitute a sufficient basis for determining the constitutional inadequacy of a plan, the Fifth Circuit followed the jury exclusion cases in which it has been held that disproportions constitute presumptive evidence of purposeful discrimination.[46] But that rule of evidence is manifestly inapplicable in the context of a free-choice plan since, as in the case of peremptory jury challenges, the selection process is not "wholly in the hands of state officers." **Swain v. Alabama**, 380 U. S. 202, 226-28 (1965). On the contrary, the selection process is wholly in the hands of the **children**. Yet, there was absolutely no evi-

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[44] As observed in Rep. U. S. Comm. on Civil Rights, **Racial Isolation in the Public Schools**, p. 60 (1967), "since residential segregation generally is as intense in Southern and border cities as in Northern cities, the racial composition of Southern and border city schools substantially reflects the pattern of residential segregation."

[45] *Id.*, at 66-70.

[46] Panel Opinion, pp. 95-96.

dence in these cases, and the court referred to nothing outside the record, which indicates in the slightest that the students' choices were influenced by any consideration other than personal preference.

II.

The Civil Rights Act of 1964 Does Not Provide Authority for the Decision.

Although the decision discusses previous decisions of this Court and draws alternately on the Fourteenth Amendment and on the "1966 Guidelines" of the Department of Health, Education and Welfare,[47] it is evident that all of the major substantive requirements imposed by the decision and decree are based directly and solely on the H. E. W. Guidelines.[48] The decision of the panel thus commences with the suggestion that the Civil Rights Act of 1964 establishes new and different constitutional standards for school desegregation.[49] It never mentions, however, where in the Civil Rights Act or its legislative

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[47] The 1966 "Guidelines" are printed as Exhibit I to the Petition in **Caddo Parish School Board v. United States.**

[48] For example, both the percentage requirements (see p. 95; 372 F. 2d at 887) and all of the essential provisions of the uniform decree (see p. 112, 372 F. 2d at 894) are drawn specifically from the Guidelines. Although the opinion states that the "substantive requirements of the decree derive from the Fourteenth Amendment as interpreted by the decisions of the Supreme Court and of this Court" and that the decision looks to the Guidelines only "[f] or administrative details," the fundamental requirements of the Guidelines to which petitioners object are clearly of constitutional dimension, rather than matters of mere administrative detail. It is equally clear that for such substantive requirements—and we speak here of the fundamental requirements of mandatory quantitative integration and of a uniform detailed decree—there is no precedent in any decision of either this Court or prior decisions of the 5th and other circuits.

[49] See generally pgs. 12-16; 372 F. 2d at 849-52.

history any such new constitutional standards are established, or indeed the nature of the new standards which it is considered to establish. It simply concludes that the 1966 Guidelines express these new standards and then holds that the Guidelines are constitutional and within the congressional intent of the Civil Rights Act. How this conclusion is reached is never demonstrated. It is based on the Court's view of Title VI as the part of the Act primarily intended to achieve school desegregation—not Title IV which is the only part of the Act which deals specifically with school desegregation.[50] The legislative history to the Act repudiates any notion that Title VI was intended to be the main vehicle for school desegregation.[51]

Moreover, Title IV, which dealt specifically with schools, provided in two separate places that the Act was not intended to provide means for the relief or elimination of racial imbalance. (See Sections 401 (b) and 407 (a) (2).) As recognized in the opinion below, the legislative history demonstrates that these provisions regarding racial imbalance were expressly intended by Congress to incorporate the constitutional principles and rationale of **Bell v. School City of Gary**, 324 F. 2d 209 (7th Cir. 1963), which held, relying on **Briggs v. Elliot**, supra, that the constitution does not require affirmative mixing.[52] Inasmuch as the decision below requires the elimination of racial imbalance, to avoid this clear intent the decision

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[50] See Opinion, p. 19.

[51] See E. g., 110 Cong. Rec. 6840 (April 7, 1964); 110 Cong. Rec. 12690 (June 9, 1964); 110 Cong Rec. 6847; 110 Cong. Rec. 8703 (April 24, 1964).

[52] 110 Cong. Rec. 12294-95 (Sen. Humphrey, June 4, 1964). Senator Humphrey thus summarized the intent of the provisions:

"The bill does not attempt to integrate the schools but it does attempt to eliminate segregation." Id.

below states that Congress' use of the term "racial imbalance" and its adoption of **Bell v. School City of Gary**, supra, were intended to apply only to Northern schools. Yet, leading Senate proponents of the bill stated specifically that the proviso to Section 407 (a) (2) was intended to apply equally to all parts of the country.[53]

The virtual adoption by the decision below of the constitutional standards applied by the Department of Health, Education and Welfare not only raises serious questions regarding the proper relationship between the Federal Judiciary and administrative agencies in formulating constitutional standards, but it also creates a conflict with decisions of other circuits. A majority of the Fourth Circuit did not adopt the "guidelines" in its most recent decisions (See Appendix B, *infra*), and the Eighth Circuit has refused to follow the "constitutional requirements" of the guidelines in **Clark v. Board of Education of Little Rock**, 374 F. 2d 569 (8th Cir. 1967).[54]

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[53] See E. g., 110 Cong. Rec. 13345 (June 15, 1964), where Sen. Saltonstall stated that, "This provision would certainly apply to all parts of the country."

[54] Although the Eighth Circuit has said it gives weight to the "guidelines", it specifically does not follow their requirements which are of constitutional dimension. It thus observes (374 F. 2d at 571):

> "If a court's view of constitutional requirements results in federal funds being channeled to where the legislative branch feels they are unwarranted, this is a defect that must be cured by the administrative and legislative branches of our Government. That problem should not be met by the Court's altering its standards of constitutional protections so that these protections might correspond to the present policy of an administrative agency. If we accept this 'easy' remedy to the proper allocation of federal funds, we would be accepting the position that the flow of federal money is the final arbiter of constitutionally protected rights."

III.

The Requirement by the Decision Below of a Uniform Detailed Decree Conflicts With the Decision of This Court and Other Circuits.

This court in **Brown II**, 349 U. S. 294 (1955), determined that it should remand the cases to the trial courts for remedial implementation rather than "formulate detailed decrees" itself. 349 U. S. at 299 n. 2. The reasons for its determination were because of the district courts' "proximity to local courts", the necessity of "solution of varied local school problems" and the desirability for a "practical flexibility in shaping its remedies . . . and a facility for adjusting and reconciling public and private needs." Id. at 299-300. Since that time this court and every other federal appellate court has adhered to this determination in every school desegregation case. In its most recent decisions, in **Rogers v. Paul**, 382 U. S. 198 (1965), and **Bradley v. School Board of City of Richmond**, 382 U. S. 103 (1965), the cases were remanded to the district courts for evidentiary hearings regarding the necessity and propriety of provisions for teacher desegregation.

The decision below adopts in its uniform detailed decree substantially the provisions of H. E. W. Guidelines issued after these appeals were taken. In doing so, the basic purposes of this court's remands in **Brown II** and other instances were ignored. None of the petitioners were afforded any opportunity of a evidentiary inquiry as to the effect and propriety of these minutely restrictive provisions on the operation of their school systems. As a result, it is impossible to anticipate what effect its provisions will have on the educational functions and perogatives of local schools which are wholly unrelated to race or segregation. Only educators and school administrators are in a position to assess the effects; neither the attor-

neys for the school boards, nor the members of the court below have the necessary knowledge or training.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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